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No. 80-939

In the Supreme Court of the United States

OCTOBER TERM 1980

FEDERAL ELECTION COMMISSION, PETITIONER

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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APRIL 16, 1981

QUESTIONS PRESENTED

(1) Whether a Commission determination to dismiss an administrative complaint requires affirmance where the determination was based upon a consistent, reasonable construction of FECA.

(2) Whether the Commission's consistent interpretation of 2 U.S.C. § 441a(d)(3) as not prohibiting intra-party agency agreements requires affirmance by this Court.*

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* In addition to the parties named in the caption, the other party to the proceeding below was the National Republican Senatorial Committee, Intervenor.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The October 9, 1980, opinion of the court of appeals is not yet officially reported but appears at Appendix C of the Federal Election Commission's Petition for a Writ of Certiorari at 26 ("FEC Pet. App. — at ———"). The order and opinion of the district court (FEC Pet. App. B at 21) is not officially reported. The determination of the Commission dismissing respondent's complaint (FEC Pet. App. A at 17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1980. FEC Pet. App. D at 70. The

court's *sua sponte* order for the immediate issuance of the mandate was also entered on October 9, 1980. FEC Pet. App. E at 72. A petition for rehearing, application to recall mandate, and suggestion for rehearing en banc were denied on October 11, 1980. FEC Pet. App. F, G at 73, 74. The petition for a writ of certiorari was filed on December 10, 1980, and was granted on March 2, 1981.[1] Jurisdiction is conferred by 2 U.S.C. § 437g(a)(9), 28 U.S.C. § 1254 (1)(1980).

STATUTES INVOLVED

2 U.S.C. § 437g(a)(8), (9) provides in pertinent part:

> (8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1) . . . may file a petition with the United States District Court for the District of Columbia. . . .
>
> (C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.
>
> (9) Any judgment of a district court under this subsection may be appealed to the court of ap-

[1] The National Republican Senatorial Committee ("NRSC") was permitted to intervene by the court of appeals. *See* Joint Appendix ("J.A.") at 2. Thereafter, NRSC petitioned the Court for a writ of certiorari separate from the Commission's petition. *See* J.A. Cover. On March 2, 1981, the Court granted both petitions and consolidated Nos. 80-939, 80-1129 for oral argument.

peals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

2 U.S.C. § 441a(d)(3) provides: [2]

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

2 U.S.C. § 441a(a)(4) provides in pertinent part:

> (4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political com-

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[2] The full text of 2 U.S.C. §§ 437g, 441a is reproduced in the Appendix hereto.

mittees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. . . .

STATEMENT OF THE CASE

This case arose when the Democratic Senatorial Campaign Committee ("DSCC") challenged in federal district court the determination of the Federal Election Commission ("the Commission" or "the FEC") not to open an investigation but to dismiss an administrative complaint which had been filed with the Commission by DSCC. 2 U.S.C. § 437g (a) (1).[3] In its administrative complaint filed May 9, 1980, DSCC alleged that the National Republican Senatorial Committee ("NRSC") had violated the Federal Election Campaign Act[4] ("FECA" or "the Act") by making expenditures in support of various Republican senatorial candidates at the request of and as agents for certain state Republican Party committees within the limits of 2 U.S.C. § 441a (d) (3).[5] DSCC contended that such intra-party ar-

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[3] *See* note 2 *supra.*

[4] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977); and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The relevant provisions of the Act are codified in Title 2, United States Code.

[5] *See* note 2, *supra.* NRSC also has an intra-party agency agreement with the Republican National Committee ("RNC") for the expenditure of funds under § 441a(d) (3). However,

rangements violated the plain meaning of § 441a (d) (3) and frustrated the statutory purpose of promoting the development of state party organizations. FEC Pet. App. C at 30. The Commission unanimously determined, by a 6-0 vote, on July 11, 1980, that there was "no reason to believe" that NRSC had violated FECA as alleged in the DSCC complaint. FEC Pet. App. A at 17. The Commission's dismissal of the DSCC complaint was consistent with two prior enforcement matters in which the FEC had been urged to construe § 441a(d)(3) to prohibit NRSC's intra-party agency agreements. *See* Certifications, Matters Under Review ("MURs") 780 and 820, FEC Pet. App. A at 18, 19.[6]

DSCC did not challenge this intra-party agency agreement. DSCC itself has a similar agreement with the Democratic National Committee ("DNC"). Thus, DSCC's administrative complaint, the Commission's consideration of DSCC's complaint, and both the district court's and the appellate court's review were limited to the propriety of intra-party agency agreements between NRSC and state Republican Party committees. *See* FEC Pet. App. C at 30.

[6] MUR 780 concerned expenditures made by NRSC during the Montana senatorial campaign of Republican candidate Larry Williams. MUR 820 reviewed NRSC's expenditures made as the agent of the Alabama Republican Party Committee in support of the candidacy of James Martin. Thus, as early as January 19, 1979, the Commission unanimously found "no reason to believe" that NRSC had violated FECA by acting as the agent of these state Republican Party committees in making § 441a(d)(3) expenditures. A Commission Advisory Opinion, AO 1976-108, provided a basis for the Commission's determinations in these MURs. AO 1976-108, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5236, concluded that the National Republican Congressional Committee ("NRCC") could, consistent with FECA, expend its own funds in support of Republican Congressional candidates as the agent for RNC.

DSCC filed its petition for review of the Commission's determination with the United States District Court for the District of Columbia on July 30, 1980. Based upon cross motions for summary judgment and full oral argument, the district court affirmed. FEC Pet. App. B at 21. The court granted the Commission's motion for summary judgment; noted the deference to be accorded the Commission's determinations; and concluded that the Commission's dismissal of DSCC's administrative complaint was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *Id.* at 22-25.[7]

DSCC appealed the order of the district court on September 3, 1980, and requested an expedited briefing and argument schedule in the court of appeals.[8] The court of appeals ordered that the Commission file its brief on September 22, 1980, that oral argument be held on September 23, 1980, and that DSCC file its reply brief after oral argument. Following oral argument, the court (through both the clerk's office and the court's chief staff counsel) requested specific additional evidentiary submissions from the parties[9] and, on October 9, 1980, in a per curiam

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[7] *See* 2 U.S.C. § 437g(a)(8)(C), Appendix, *infra*. The district court's interpretation of the contrary to law standard mandated by § 437g(a)(8)(C) as requiring reversal of only those Commission determinations which are arbitrary or capricious is consistent with the standard employed in all previous actions reviewing Commission determinations. *See* Argument I, *infra*.

[8] *See* 2 U.S.C. § 437g(a)(10), Appendix, *infra*.

[9] In response to a request made during oral argument, the Commission submitted citations to legislative history from the 1974 and 1976 FECA Amendments concerning the role of the national senatorial and congressional campaign com-

opinion, reversed the district court judgment, declaring the Commission's action to be contrary to law. 2 U.S.C. § 437g(a)(8)(C). Concluding that the Commission had presented no reasoned explanation for its determination,[10] the court decided the issue *de novo*. FEC Pet. App. C at 37. The court held that neither the language of the statute nor its legislative history could support the Commission's interpretation that Congress did not intend to prohibit agency agreements as employed by the Republican Party committees, including NRSC.[11] In addition, the court issued its

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mittees within the political party structure. *See* Appendix hereto at 28a. And pursuant to the October 1, 1980 request of the court, the Commission submitted Commission certifications and final General Counsel's Reports for MURs 780 and 820. *See* Appendix hereto at 30a, 32a. Finally, upon inquiry transmitted by the court's chief staff counsel, the Commission, on October 7, 1980, submitted information concerning DSCC's having acted as an agent on the national level for the purpose of making § 441a(d) expenditures. *See* Appendix hereto at 34a.

[10] FECA only requires the Commission to decide whether to prosecute and does not require the Commission to issue a formal statement of the reasons supporting determinations in enforcement matters. *See* 2 U.S.C. § 437g, Appendix, *infra*. Commission decisions in enforcement matters are accompanied by a General Counsel's Report analyzing the factual and legal issues raised by the complaint for the Commission, which have been accepted as support for Commission determinations. *See* note 18, *infra*.

[11] Judge Wilkey dissented, recognizing that § 441a(d)(3) does not prohibit the intra-party agency arrangement. Viewing DSCC's challenge as one of form over substance, he noted that since party committees may transfer money pursuant to 2 U.S.C. § 441a(a)(4), it made no difference if the state committees sent money directly to the national committee or authorized the national committee to make expenditures on

mandate that same day, directing the Commission to conform forthwith with its decision that the intra-party agreements violated FECA. FEC Pet. App. E at 72. *See* Rule 41(a) F.R.A.P.

On October 10, 1980, while the Commission was endeavoring to conform with the court's decision within the 30-day statutory deadline,[12] intervenor NRSC filed an application to recall mandate and a petition for rehearing and suggestion for rehearing *en banc* which were denied on October 11, 1980. On October 17, 1980, the Chief Justice issued a stay of the appellate court's judgment, FEC Pet. App. H at 76, and on October 21, 1980, the full court denied DSCC's motion to vacate the stay.[13] J.A. at 8, 9.

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their behalf. In either case, Judge Wilkey concluded, the money would be spent and collected by a designated committee within the overall limitations of the Act. In addition, he warned that the strong legislative intent that campaign funds flow freely among political committees of the same party would be frustrated by the court's decision. FEC Pet. App. C at 53.

[12] 2 U.S.C. § 437g(a)(8)(C) provides that the court may direct the Commission to conform with its finding that the Commission acted contrary to law within 30 days. However, the Commission is prohibited by FECA from proposing new rules of law or regulations except in accordance with the procedures established by Congress. 2 U.S.C. §§ 437f(b), 438(d). FECA's rulemaking procedures cannot be completed within 30 days. *See Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir. 1977), *aff'd sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977).

[13] In issuing a stay, the Court considers:

> (a) whether irreparable injury may occur absent a stay; (b) the probability that the Court of Appeals was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the judgments of the Court of Appeals.

O'Brien v. *Brown*, 409 U.S. 1, 3 (1972).

SUMMARY OF ARGUMENT

The question presented for this Court's review is whether congressional intent to establish the Federal Election Commission with exclusive jurisdiction to administer and enforce the Federal Election Campaign Act is abrogated where the court of appeals substitutes its judgment, reversing a consistent construction of 2 U.S.C. § 441a(d)(3) in the setting of a Commission enforcement action. Congressional intent is clear as to the exclusivity of the Commission's enforcement and administrative authority. 2 U.S.C. §§ 437c(b), 437d(e). *See also Cort* v. *Ash*, 422 U.S. 66 (1975).

The enforcement procedures enacted by Congress by which the Commission determines, upon review of an administrative complaint, whether there is "probable cause to believe" that a violation of the Federal Election Campaign Act has occurred reflect congressional recognition of the potential political sensitivity of Commission enforcement determinations. 2 U.S.C. § 437g; *Durkin For U.S. Senate Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9147 at 51,113 (D.N.H. 1980). Thus, the Commission, composed of six voting members, no more than three of whom may be of the same political party, may find "probable cause to believe" or initiate a civil enforcement suit only by the affirmative vote of four voting members. 2 U.S.C. §§ 437c(c) and 437g(a)(2), (4)(A)(i), (6)(A). And the Commission may dismiss complaints in the same manner or by failing to provide the four votes necessary to continue an enforcement matter.

Moreover, consistent with congressional intent to minimize the potential political effect of Commission enforcement determinations, FECA requires that investigations conducted pursuant to 2 U.S.C. § 437g

be confidential. 2 U.S.C. § 437g(a)(12). Once an enforcement matter is concluded, the Commission must notify the parties and put the entire investigative file, with the exception of information provided during an attempted conciliation, on the public record. 2 U.S.C. § 437g(a)(4)(B), 11 C.F.R. § 111.20.

The Commission followed Congress's mandate in this case. After the Democratic Senatorial Campaign Committee filed an administrative complaint, the Commission considered the allegations therein and unanimously determined that there was "no reason to believe" that a violation of FECA had occurred as alleged. In doing so, the Commission considered a General Counsel's Report which analyzed the factual and legal issues raised by the complaint and which recommended the action taken by the Commission. General Counsel's Reports have been accepted as support for Commission determinations. *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 at 50,439-40 (D.D.C. 1977), *aff'd* No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion). *See also Brown* v. *Federal Election Commission*, No. 79-0940 (D.D.C. July 17, 1980), *appeal docketed*, No. 80-2108 (D.C. Cir. Sept. 15, 1980); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1046 (D.D.C. 1979). *Accord, National Conservative Political Action Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (D.D.C. 1978), *aff'd as modified on other grounds*, 626 F.2d 953, 956 n.8 (D.C. Cir. 1980). The Commission then closed its file on the matter and put the file on the public record.

Upon DSCC's petition, the United States Court of Appeals for the District of Columbia reversed the

district court's affirmance of the Commission's action and, concluded that

> [w]e deal in this case not with a discretionary exercise of Commission power, but with an interpretation of a federal statute,

FEC Pet. App. C at 33, and substituted its judgment as to the proper construction of the statute for the Commission's. The court took this extraordinary action despite the fact that established precedent in the District of Columbia Circuit had extended judicial deference to the Commission's expert statutory interpretations. *National Conservative Political Action Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide at 50,915 n.7, adopting the reasons stated by the lower court. *See also, In re Carter-Mondale Reelection Committee*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132 at 51,037 (D.C. Cir. 1980); *Hampton* v. *Federal Election Commission, supra; Gelman* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 at 51,020 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3227 (October 6, 1980). Although the Commission might have interpreted the statute in the same manner as the court of appeals, this Court has

> consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.

Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356, 371 (1973), citing *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119, 124

(1944); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943); *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936).

In disagreeing with the Commission's consistent interpretation of 2 U.S.C. § 441a(d)(3), the court of appeals has required that the Commission develop a new rule of law or statutory interpretation in the context of an administrative investigation. However, Congress has specifically provided other procedures, Advisory Opinions and Rulemaking, more properly designed for the type of "reasoned explanation" desired by the court of appeals. FEC Pet. App. C at 34. Thus, Congress has authorized the Commission to "render advisory opinions," 2 U.S.C. § 437d (a)(7), and to "prescribe rules, regulations and forms to carry out the provisions" of the Act. 2 U.S.C. §§ 437d(a)(8), 438(a)(8). Congress sculpted these procedures to ensure that Commission interpretive decisions are fully supported by the Act or its legislative history and open to public comment. And this Court has recognized rulemaking procedures as the best method for construing a statute or establishing new standards; they are designed to fill the interstices of a statute, *Securities and Exchange Commission* v. *Cheney Corp.*, 332 U.S. 194, 202 (1947), and to "promulgat[e] policy type rules or standards." *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 245 (1973). Indeed, the Commission's advisory opinion process has been viewed as a ". . . prompt means of resolving doubts with respect to the statute's reach." *Martin Tractor Co.* v. *Federal Election Commission*, 627 F.2d 375, 384 (D.C. Cir. 1980), *cert. denied sub nom, National Chamber Alliance for Politics* v. *Federal Election*

Commission, —— U.S. ——, 100 S.Ct. 360 (1980). Moreover, DSCC itself is familiar with the procedure for petitioning the Commission to institute rulemaking, 5 U.S.C. § 553(e), having been a party to the first and only such petition filed thus far with the Commission. *See* note 31, *infra*.

In any event, the Federal Election Commission's interpretation of 2 U.S.C. § 441a(d) as not prohibiting intra-party agency agreements is not contrary to law. The question presented to the Commission in DSCC's administrative complaint was whether one party committee (a state committee) violated 2 U.S.C. § 441a(d) by designating another party committee (a national committee) for purposes of expenditure limitations contained in § 441a(d)(3). The court of appeals concluded that because NRSC was not specifically identified in § 441a(d)(3) and because the statute does not specifically allow the intra-party agency agreements in question, the statute "seems to preclude" the agreement. FEC Pet. App. C at 39. However, this Court has concluded that "absent a clear expression, it becomes necessary to consider the implicit character of the statutory scheme . . . and it is appropriate to defer to the [agency] in determining what resolution of that issue is implied. . . ." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 560 (1980). *See also Citizens and Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977) ("[o]ur experience with the inexactitude of congressional language, an inexactitude that perhaps often is inevitable . . . [citing *Buckley* v. *Valeo*, 424 U.S. 1 (1976)] does not convince us that much weight can be attached to the use of "any" and "the" respectively . . ."). *Id.* at 45. *See* note 36, *infra*; FEC Pet. App. C at 43 n.34.

Not only does the statutory language not prohibit intra-party agreements but an interpretation of § 441 a(d) which would prohibit such agreements would conflict with the intent of Congress, for it is clear that Congress, both in 1976 and most recently in 1980, meant to encourage a close working relationship within the political party structure and among the various political party committees. Thus, Congress provided that the limitations on contributions were not to apply to "transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." 2 U.S.C. § 441a(a)(4). *See also* 2 U.S.C. § 441a(a)(5)(B). Because transfers of funds between the political committees of a party are free from any contribution limitations and are permitted without limit, it is clear that Congress perceived the various committees within the parties to be closely connected units and wished to encourage their working toward a common purpose. See also H.R. 11315, 95th Cong., 1st Sess. (1978), H.R. Rep. No. 95-982, 95th Cong. 2d Sess. (1978). Section 113 of H.R. 11315 would have prohibited any "movement of funds" between "the political committees of a national political party (including House and Senate congressional campaign committees of such party) and the political committees of a State political party (including district, local, or subordinate committees of such party) for the purpose of making contributions to, or expenditures on behalf of any candidate for Federal office." The House, however, rejected the rule for consideration of the bill. *See* 124 Cong. Rec. H 2261-69 (daily ed. Mar. 21, 1978).

By considering an amendment to FECA which would have the effect of prohibiting NRSC from

transfering funds to state committees to enable the state committees to effect § 441a(d) expenditures, the House recognized that FECA as it now stands does not limit such transfers. By not adopting the proposed amendment, the House left the decision as to the proper mechanism for § 441a(d) expenditures to the political parties themselves. And, as this Court has recognized, reenactment of a statute without change in its language indicates approval of interpretations rendered prior to the reenactment. *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 351 (1953); *Helvering* v. *Griffiths*, 318 U.S. 371, 395 (1943). The Commission's construction of 2 U.S.C. § 441a(d)(3) was thus consistent with statutory language, Commission regulations and Advisory Opinions and Congressional legislative history. This Court should affirm the Commission's decision, reversing the judgment of the court of appeals.

ARGUMENT

I. THE COMMISSION'S DECISION TO DISMISS AN ADMINISTRATIVE COMPLAINT BASED UPON A REASONABLE CONSTRUCTION OF FECA REQUIRES AFFIRMANCE.

This case presents an important question concerning the Federal Election Commission's exclusive role as the expert body established by Congress to administer, enforce and interpret the Federal Election Campaign Act. This Court has already recognized that

> the Commission, which has "primary jurisdiction" with respect to civil enforcement, § 437c(b), has the sole discretionary power "to determine" whether or not a civil violation has occurred or is about to occur, and consequently

> whether or not informal or judicial remedies will be pursued.

Buckley v. *Valeo*, 424 U.S. 1, 112 n.153 (1976).[14] Moreover, Congress has very carefully established the Commission, consistent with this Court's ruling in *Buckley* v. *Valeo*, *supra*, as an expert agency vested with exclusive responsibility for the coherent administration and enforcement of FECA. As recognized by Judge Wilkey:

> Deference to the Commission's view on election law policy and what constitutes compliance seems particularly advised in that events occur very quickly in an election year. The Commission is the expert body charged by Congress with the coherent administration of elections and must, therefore, be competent to reach expeditious and equitable judgments drawing reason out of a melange of vaguely consistent election laws obviously adopted by the process of political compromise on this highly charged political field; it is the Commission which is prepared to read the body of election law as a whole. Moreover, the Commission is self-consciously bipartisan. Congress created a Commission, 2 U.S.C. § 437c (1976), which could make sensitive political decisions cognizant of bipartisan exigencies. Courts should tread lightly on these matters of party politics.

FEC Pet. App. C at 47 n.2.

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[14] FECA now vests the Commission with "*exclusive jurisdiction* with respect to the civil enforcement" of the Act. 2 U.S.C. § 437c(b). (emphasis added). *See In re Carter-Mondale Reelection Committee*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132 at 51,039 n.9 (D.C. Cir. 1980).

The Commission's statutory and regulatory interpretations, especially within the context of the enforcement process, are the Commission's principal administrative tools to ensure uniform application and enforcement of FECA. Such determinations must be given great weight. As this Court observed in another statutory context,

> to accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation.

Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973). The court of appeals, by reversing the Commission's decision not to proceed with an administrative investigation which was based upon its construction of the statute, has thwarted Congressional intent.

A. Congress Intended that the Commission, Through FECA's Enforcement Process, Provide Uniform Application of the Statute as Enacted.

The Federal Election Commission was created by statute in 1974 as the agency with exclusive authority to "administer, seek to obtain compliance with, and formulate policy with respect to [FECA]." 2 U.S.C. § 437c(b). In order to provide centralization and uniformity, the Commission has been vested with exclusive jurisdiction for civil enforcement of the Act. 2 U.S.C. §§ 437c(b)(1), 437d(e).[15] *See also*

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[15] U.S.C. § 437c(b)(1) states:

> The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Com-

Cort v. *Ash*, 422 U.S. 66 (1975). To implement the Commission's enforcement authority, Congress enacted detailed administrative enforcement procedures designed to ensure the impartial disposition of complaints in the highly charged atmosphere of pending federal elections. *Durkin for U.S. Senate Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9147 at 51,113 (D.N.H. 1980). Any person who believes a violation of the Act has occurred may file a complaint with the Commission. The Commission must notify any person alleged to have committed such a violation and provide such person 15 days to demonstrate that no action should be taken on the basis of the complaint. 2 U.S.C. § 437g (a)(1). Only if the Commission then votes to find "reason to believe" a violation has occurred, may it proceed to an investigation of such alleged violation.[16] 2 U.S.C. § 437g(a)(2).

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mission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

2 U.S.C. § 437d(e) states:

Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

[16] One court has recognized that:

The issue of whether a particular charge merits an investigation is a sensitive and complex matter calling for an evaluation of the credibility of the allegation, the nature of the threat posed by the offense, the resources available to the agency, and numerous other factors. Congress has wisely entrusted this matter to the discretion of the [FEC] and instructed the courts to interfere only when the Commission's actions are "contrary to law."

In re Federal Election Campaign Act Litigation, 474 F. Supp. 1044, 1045-6 (D.D.C. 1979).

The Commission, uniquely structured, is composed of six voting members, 2 U.S.C. § 437c(a)(1). The Commission does not itself adjudicate whether or not a violation has occurred.[17] Rather, the Commission is authorized to vote initially on whether there is "reason to believe" a violation has occurred, and following an investigation, the Commission determines whether there is "probable cause to believe" and must attempt to reach a conciliation agreement with respondents. Only if concilation fails, may the Commission seek adjudication in court. 2 U.S.C. § 437g (a)(6)(A).

To make the necessary judgment of whether to invoke its investigative and prosecutorial authority, Congress has placed reliance on the experience and expertise of the six voting members of the Commission, no more than three of whom may be of the same political party. Pursuant to 2 U.S.C. §§ 437c(c) and 437g(a)(2), (4)(a)(i), (6)(A), there must be four

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[17] One commentator has suggested that the Commission "misconceives" its function as a non-adjudicatory body. Note, *The Federal Election Commission: The First Amendment and Due Process*, 89 Yale L.J. 1199, 1203 (1980). However, it is clear that Congress has carefully crafted FECA's enforcement procedures and defined the Commission's role therein as one of investigation, encouraging voluntary compliance and conciliation, and prosecution of violations in federal district courts. Thus, FECA does not authorize the Commission to *impose* civil penalties or admissions of violations, *id.* at note 31, and Commission determinations, even at the "probable cause" stage of an investigation, remain investigatory and prosecutorial since FECA limits Commission findings to "reason to believe" and "probable cause to believe" that a violation has occurred. 2 U.S.C. § 437g, Appendix, *infra*. Congress has explicitly provided that only a federal district court will determine that a violation has occurred. 2 U.S.C. § 437g (a)(6)(A), Appendix, *infra*.

affirmative votes to find "probable cause to believe" or to initiate a civil suit. The Commission may dismiss complaints either by an affirmative vote by four of the six voting members or by failing to provide the four votes necessary to continue an enforcement matter. Once a matter is dismissed, the Commission is required to notify the parties and to put the file on the public record. 2 U.S.C. § 437g(a)(4)(B)(ii), 11 C.F.R. § 111.20.[18] When the Commission dismisses a complaint, aggrieved complainants may seek a judicial determination that the dismissal was contrary to law. 2 U.S.C. § 437g(a)(8).[19]

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[18] The per curiam opinion of the court of appeals indicated that FECA's requirement that the Commission's investigative file, including all General Counsel's Reports to the Commission, be made public at the close of an investigation is insufficient to support the Commission action either for the purposes of public disclosure or for a reviewing court. FEC Pet. App. C at 34 n.23. However, the United States Court of Appeals for the District of Columbia Circuit had previously held that the General Counsel's Report to the Commission *is sufficent* to support the Commission's dismissal of an administrative complaint. *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 at 50,439-40 (D.D.C. 1977), *aff'd* No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion). *See also National Republican Senatorial Committee* v. *Federal Election Commission*, No. 80-2266 slip op at 4 n.14 (D.D.C. March 5, 1981); *Brown* v. *Federal Election Commission*, No. 79-0940 (D.D.C. July 17, 1980), *appeal docketed*, No. 80-2108 (D.C. Cir. Sept. 15, 1980); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. at 1046. *Accord, National Conservative Political Action Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (D.D.C. 1978), *aff'd as modified on other grounds*, 626 F.2d 953, 956 n.8 (D.C. Cir. 1980).

[19] *See* Statutes Involved, *supra* at 2, for the text of 2 U.S.C. § 437g(a)(8)(C).

Congress intended that a court, reviewing a Commission determination to dismiss an administrative complaint, should reverse that determination only if it is found "arbitrary or capricious or otherwise contrary to law." *Buckley* v. *Valeo*, 424 U.S. at 113 n.154; 5 U.S.C. § 701.[20] The court of appeals in this case, however, ignored Congress's clear intent that a high level of deference be accorded Commission enforcement determinations. Rather, the court reversed the Commission's determination that an enforcement action was not warranted because it disagreed with the Commission's construction of the statute. It thus concluded:

> We deal in this case not with a discretionary exercise of Commission power, but with an interpretation of a federal statute.

FEC Pet. App. C at 33. The court ignored the fact that the Commission's interpretation of the statute in question was in the context of a determination not to proceed with an administrative investigation, a classic discretionary power. *City of Chicago* v. *United States*, 396 U.S. 162, 165 (1969) ("[w]hether the Commission should make an investigation . . . is of

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[20] The "arbitrary and capricious" standard has been recognized as the appropriate mode of reviewing Commission determinations. *See In re Carter-Mondale Reelection Committee*, 2 Fed. Elec. Camp. Fin. Guide at 51,036; *National Republican Senatorial Committee* v. *Federal Election Commission*, *supra*, slip op. at 3. *Brown* v. *Federal Election Commission*, *supra*, slip op. at 2; *International Association of Machinists and Aerospace Workers* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9144 at 51,105 (D.D.C. 1980) *appeal docketed*, No. 81-1044 (D.C. Cir. January 14, 1981); *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide at 50,439-40.

course within its discretion, a matter which is not reviewable"); *General Protective Committee* v. *Securities and Exchange Commission*, 346 U.S. 521, 533 (1954) (a statutory provision that the SEC upon request "may" apply to a court for enforcement of a plan implies "the exercise of discretion" and the considerations governing such exercise "embraces a variety of factors"); *General Motors Corporation* v. *Federal Energy Regulatory Commission*, 613 F.2d 939, 944 (D.C. Cir. 1979) ("an administrative agency's decision to conduct or not to conduct an investigation is committed to the agency's discretion"). *See also Union Mechling Corporation* v. *United States*, 566 F. 2d 722, 724 (D.C. Cir. 1977).[21]

Although the Commission might have concluded, as did the court of appeals, that § 441a(d)(3) could be

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[21] Established precedent in the District Court of Columbia Circuit had extended judicial deference to the Commission's expert statutory interpretations:

> At the outset, the Court is mindful that an agency's interpretation of its own enabling legislation is entitled to great weight from the courts. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Regulation 110.1(g)(1) is the product of a consistent course of decision-making by the FEC, and is deserving of deference from the Court unless clearly repugnant to the provisions of the Federal Election Campaign Act.

National Conservative Political Action Committee v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide at 50,915 n.7, adopting the reasons stated by the lower court. *See also In re Carter-Mondale Reelection Committee, Inc.*, 2 Fed. Elec. Camp. Fin. Guide at 51,037; *Hampton* v. *Federal Election Commission, supra; Gelman* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 at 51,020 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3227 (October 6, 1980).

interpreted as restricting the intra-party financial arrangements employed in making expenditures thereunder,[22] this court has

> consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.

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[22] The Commission might have been precluded, however, from reversing itself on a construction of § 441a(d) within the confines of an enforcement matter. Since the Commission had previously interpreted § 441a(d) as not rendering illegal NRSC agreements with state Republican Party committees for the purpose of making § 441a(d)(3) expenditures, reversal of this position and the Commission's application of this new construction to NRSC's activities in the 1980 election, could have been construed as the retroactive application of a new rule of law. This Court has consistently held that the retroactive application of new standards or rules of law should be avoided especially where the resulting inequity would be greater than the statutory purpose to be effectuated by the application. *Chevron Oil Company* v. *Huson*, 404 U.S. 97, 106-8 (1971); *Securities and Exchange Commission* v. *Cheney*, 332 U.S. 194, 203 (1947). *See also Retail Wholesale and Department Store Union* v. *National Labor Relations Board*, 426 F.2d 380 (D.C. Cir. 1972). As recognized by this Court's expedited issuance of a stay of the court of appeals' mandate, the inequity of applying the court's new construction to NRSC's activities in the 1980 election would have been exacerbated by the timing of the judgment and mandate, issued less than one month prior to November 4, 1980. *See O'Brien* v. *Brown*, 409 U.S. at 1. Moreover, FECA itself limits the Commission to initially proposing any rule of law not stated in the Act or regulations already prescribed thereunder "only as a rule or regulation pursuant to procedures established" by Congress. 2 U.S.C. §§ 437f(b), 438(d). *See* Argument B, *infra*.

Mourning v. *Family Publications Service, Inc.*, 441 U.S. at 371, *citing Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119, 124 (1944); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943); *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936). Because the Commission is the expert agency established by Congress with the exclusive authority to enforce FECA, its determinations with regard to FECA's application and enforcement are entitled to great weight.[23] The Commission's judgment

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[23] The court of appeals rejected the Commission's determination stating that it found "a troubling absence of consistent reasoning" in the Commission's construction of the statute. FEC Pet. App. C at 35. To the contrary, the Commission has consistently adhered to its construction of § 441a(d)(3) as not limiting party committees in their financial arrangements. As Judge Wilkey recognized, the construction of § 441a(d)(3) was one "validated and sustained by the FEC against every challenge since 1976." FEC Pet. App. C at 58. More specifically, the Commission consistently construed § 441a(d)(3) so as not to prohibit NRSC's intra-party agency agreements in the context of three separate administrative complaints. *See* note 6, *supra*. In the General Counsel's Report to the Commission with regard to MUR 780, the General Counsel relied primarily on the absence of any specific prohibition in FECA in recommending that the Commission construe § 441a(d)(3) as not prohibiting NRSC from utilizing the challenged intra-party agency agreements. The Report also drew an analogy to the Commission's construction of § 441a(d) in a previous Advisory Opinion. AO 1976-108, note 6, *supra*. In MUR 820, the General Counsel's Report recognized the Commission's construction of the statute in MUR 780, drew the same analogy to AO 1976-108, and cited, as additional justification for the recommended statutory construction, 11 C.F.R. § 110.7. Finally, with regard to MUR 1234, challenged in the instant case, the General Counsel's Report noted that this was the third occasion on which the Commission had been asked to construe § 441a(d)(3) to prohibit NRSC's intra-party financial arrangements,

should be affirmed if it is "reasonably related to the purposes of the enabling legislation," *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969) and "within the bounds of [its] administrative powers." *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. at 236. *See also American Trucking Associations* v. *United States*, 344 U.S. 298 (1953). Because Congress has mandated that the Commission be accorded exclusive jurisdiction with regard to FECA's enforcement, the

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and added, as justification for the recommendation, an analysis of § 441a(d)(3) itself, a review of the provision's legislative history, and the fact that Congress had amended FECA recently with knowledge of the Commission's construction of § 441a(d)(3) and had let that construction stand. All Commission votes with regard to the construction of § 441a(d)(3) in MURs 780, 820 and 1234 were unanimous.

The per curiam opinion of the court of appeals concluded that "the Counsel's shifting positions offer no adequate support for a claim that the Commission's position here is a product of thorough consideration, careful deliberation, and secure judgment." FEC Pet. App. C at 37. The Commission disagrees that three consistent results can equal a "shifting position", and notes that at least some of the variance in cited support for the recommended statutory construction was the result of differences in the three separate administrative complaints themselves. In any event, this Court has expressly held that an agency may alter its interpretation of a statutory term in light of administrative experience. *National Muffler Dealers Assoc., Inc.* v. *United States*, 440 U.S. 472, 485 (1979); that an administrative agency is not disqualified from changing its mind, *National Labor Relations Board* v. *Local Union No. 103, International Assoc. of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 351 (1978); and that the authority for an agency to modify its construction of a statute in light of cumulative experience is clear. *Beth Israel Hospital* v. *National Labor Relations Board*, 437 U.S. 483, 508 (1978).

Commission's construction of 2 U.S.C. § 441a(d)(3), "[u]nless demonstrably irrational, . . . should be dispositive." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980).[24]

B. Congress Intended that FECA's Advisory Opinion and Rulemaking Processes be Utilized for the Development of Rules of Law to Implement FECA.

In disagreeing with the Commission's interpretation in the instant action, the court of appeals rested its judgment largely on its perception that the Commission

> presented no reasoned explanation of its decision. It merely pronounced that it found 'no reason to believe' that the NRSC violated the Act in making expenditures as agents of the national and state committees.

FEC Pet. App. C at 34. The court rejected as insufficient in this instance the Commission's practice of making such a finding, closing its file on the matter, and placing the entire file, "including staff reports and

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[24] As Judge Wilkey recognized:

> The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) and by commentators, *e.g.*, Scalia, *"Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court,"* 1978 S.Ct. Rev. 345, 358, 371. Deference to the Commission on new issues like this before a new agency gives the agency the chance it needs to make its own interpretation, because it has the responsibility to make its statute work. *Power Reactor* v. *Electricians*, 367 U.S. 396, 408 (1961).

FEC Pet. App. C at 47 n.6.

recommendations," in a public file. FEC Pet. App. C at 34, 32. But this is precisely what Congress has required that the Commission do when it concludes enforcement matters.[25] *See* 2 U.S.C. § 437g. The court's judgment is thus premised on a misapprehension of the statutory scheme enacted by Congress, for it is the Advisory Opinion procedures and the rulemaking procedures which are designed to meet the objections of the court of appeals.[26] Thus, Congress has authorized the Commission to "render advisory opinions," 2 U.S.C. § 437d(a)(7), and to "prescribe rules, regulations and forms to carry out the provisions" of the Act. 2 U.S.C. §§ 437d(a)(8), 438(a)(8).[27] Congress has sculpted FECA's advisory

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[25] One commentator has argued that the Commission's compliance with Congress's mandate that its enforcement matters be held confidential and made public only at the close of the investigation

> reduces the coherence and predictability of enforcement decisions and deprives political participants of a guide to the Commission's interpretation of the law.

Note, *The Federal Election Commission: The First Amendment and Due Process, supra,* note 15. However, this argument ignores the availability and wide-spread use of FECA's Advisory Opinion procedure as enacted by Congress and the option available to political participants to petition the Commission to institute a rulemaking proceeding to resolve "difficult interpretive questions." *Id.* at 1200 n.13.

[26] Rulemaking procedures have been recognized as the best method for construing a statute or establishing new standards. They are designed to fill in the interstices of a statute. *Securities and Exchange Commission* v. *Cheney,* 332 U.S. at 202 and to "promulgat[e] policy type rules or standards." *United States* v. *Florida East Coast R. Co.,* 410 U.S. 224, 245 (1973).

[27] The full text of 2 U.S.C. §§ 437d(a)(7), (8), 438(a)(8) is reprinted in the Appendix hereto.

opinion and rulemaking procedures to ensure that Commission decisions in these areas are fully supported by the Act or its legislative history and open to public comment.

Thus, FECA specifically requires that the Commission issue Advisory Opinions on the application of "any rule of law" found in FECA or in any regulation prescribed thereunder to "a specific transaction or activity."[28] 2 U.S.C. § 437f(a), (b). Moreover, FECA's Advisory Opinion procedure requires that the Commission make public all requests for advisory opinions and accept written comments on such requests. 2 U.S.C. § 437f(d). And the Government in the Sunshine Act, 5 U.S.C. § 552b, requires that Commission meetings discussing or issuing advisory opinions be public.[29]

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[28] Congress has also ensured that persons to whom advisory opinions are issued and persons involved "in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which," an advisory opinion was rendered may rely on the opinion. 2 U.S.C. § 437f(c).

[29] The Commission's advisory opinion process has been viewed as a ". . . prompt means of resolving doubts with respect to the statute's reach." *Martin Tractor Co.* v. *Federal Election Commission*, 627 F.2d 375, 384 (D.C. Cir. 1980), *cert. denied sub nom., National Chamber Alliance for Politics* v. *Federal Election Commission*, —— U.S. ——, 100 S.Ct. 360 (1980). *See Bread Political Action Committee* v. *Federal Election Commission*, 635 F.2d 621, 633 (7th Cir. 1980) (en banc), *appeal docketed* No. 80-1481 (March, 1981). Moreover, the process has been utilized successfully by political participants seeking advice concerning the application of § 441a(d) to their proposed activities. *See, e.g.*, AO 1975-2, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5108, (§ 608(f)(3), statutory predecessor to § 441a(d), does not prohibit allocation of a state's expenditure limit thereunder to a subordinate

Additionally, the Commission's rulemaking power and its power to issue regulations extends to the prescription of all "rules, regulations, and forms to carry out the provisions" of FECA. 2 U.S.C. § 438(a)(8). Congress has enacted precise procedures governing this process which require that the Commission transmit to Congress a detailed "explanation and justification" of any rule or regulation. 2 U.S.C. § 438(d)(1). Moreover, Congress has reserved to itself the power to disapprove any rule or regulation as submitted by the Commission by a vote of either House. 2 U.S.C. § 438(d)(2). And the Commission publishes in the Federal Register any notice of proposed rulemaking, soliciting public comment thereon.[30]

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party committee); AO 1975-29, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5129, (§ 441a(d) does not limit the allocation of expenditures between a State party committee and a subordinate party committee except to the extent of the aggregate limitation); AO 1976-108, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5236, (§ 441a(d) does not limit the Republican National Committee to the use of its own funds when designating NRSC as its agent for the purpose of making § 441a(d)(3) expenditures); AO 1978-50, 1 Fed. Elec. Camp. Fin Guide (CCH) ¶ 5353, (State party Committee's expenses for a get-out-the-vote drive are limited by § 441a(d)); AO 1979-9, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5400, (§ 441a(d) does not prohibit a subordinate state party committee from making "§ 441a(d)" expenditures directly to vendors); AO 1979-30, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5413, (state party committees making § 441a(d) expenditures must register with the Commission for disclosure purposes); AO 1980-119, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5561, (expenditures for television air time made by NRSC in support of a senatorial candidate are limited by § 441a(d) even though the air waves reach beyond the state to persons ineligible to vote).

[30] A provision permitting good faith reliance on a rule or regulation is found at 2 U.S.C. § 438(e).

Had DSCC been truly interested in ascertaining from the Commission whether § 441a(d)(3) would prohibit agency agreements it desired to reach with its own state Democratic Party committees, it could have requested that the Commission issue an advisory opinion on the matter. The Commission would have then been required to make such a request public, to accept public comments and to issue the opinion within a statutory time restraint, applying FECA or a Commission rule or regulation to the specific transaction suggested by DSCC. *See* 2 U.S.C. § 437f. Moreover, if DSCC were asking that the Commission reverse its prior interpretation and construction of FECA, the proper statutory procedure to be employed would have been the Commission's rulemaking procedures. *See* 2 U.S.C. § 438(d).[31]

By reversing the Commission's interpretation of 2 U.S.C. § 441a(d)(3), an interpretation applied in the context of an enforcement matter, supported by statutory language and legislative history and, by way of analogy, by a Commission regulation and an advisory opinion, the court of appeals has disregarded congressional intent. Such a reversal must be con-

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[31] DSCC is familiar with the procedure for petitioning the Commission to institute rulemaking, 5 U.S.C. § 553(e), having been a party to the first and only such petition filed thus far with the Commission. In response to the petition filed by DSCC and DNC on April 3, 1980, the Commission adopted a procedure requiring publication of the petition and acceptance of written public comments thereon. Although the Commission declined to institute the rulemaking suggested by DSCC, deeming the requested rule outside its jurisdiction, the publication of the request elicited written comments from interested members of the public, and the Commission's consideration of the matter was conducted at a meeting open to the public.

sidered a new rule of law and Congress has specifically limited the Commission to prescribing rules, regulations or forms only within the procedures enacted at 2 U.S.C. § 438(d). Thus, Congress has reserved to itself the final disapproval of Commission regulations, and has required that proposed Commission regulations be transmitted to Congress accompanied by a detailed explanation and justification.[32] The court of appeals has unnecessarily intruded itself into this procedure, ignoring Congress's final disapproval authority. To the extent that the judgment of the court of appeals requiring that the Commission conform with its construction of § 441a(d)(3) is a requirement that the Commission prescribe a new rule or regulation outside the statutory frame-

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[32] The Commission has been criticized before Congress for developing rules on an entirely *ad hoc* basis in the course of its enforcement (or compliance) activities, with the result that candidates and committees are held liable for violating

> rules which have been developed entirely after the fact. . . . Under this practice, when a fact pattern comes before the Commission—either through a third party complaint or in the course of its supervisory activities—it will develop a sense or impression, that certain conduct constitutes a violation of the Act and that initiation of a compliance proceeding is appropriate. In the course of this proceeding, the Office of General Counsel will articulate—and the Commission may well adopt—a "rule of law" (which I advisedly place in quotation marks) which is nowhere found in the Campaign Act, the Regulations, Commission Advisory Opinions, or policy statements, and which raises important policy questions.

Testimony of Robert F. Bauer, Esquire—Before the Committee on House Administration, Task Force on Enforcement, June 18, 1980.

work, the court has disregarded Congressional intent. *See* 2 U.S.C. § 437f(b). Not only should the court have deferred to the Commission's expert construction of § 441a(d)(3), but to the extent that the court deemed such a construction inadequately supported by the statute, the court was required to refer DSCC to FECA's advisory opinion or rulemaking procedures.[33] Making its own new rule disregards Congressional intent.

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[33] DSCC itself now seems to recognize the perils of seeking agency rulemaking in the context of administrative enforcement proceedings, having requested that this Court "vacate the Judgment of the Court of Appeals and instruct the District Court to dismiss the action." Respondent's Brief in Opposition at 8 (Feb. 6, 1981). DSCC argued that this Court should deny the Commission's petition for a writ of certiorari because "[w]ith the passing of the Congressional elections of 1980, this case has been mooted," Respondent's Brief in Opposition at 7, and, that since its complaint to the Commission was acted upon and reviewed by the district court and the court of appeals in less than 5 months, another such sequence of events, including review by this Court, could occur prior to the next election. *Id.* at 9. However, as this Court recently recognized in another election-related case:

> [t]his case is not moot. . . . The effect of the . . . [court of appeals' judgment and mandate] remains and controls future elections. *Moore* v. *Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493 1494, 23 L.Ed.2d 1. In any event, even if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one "capable of repetition, yet evading review." *Rosario* v. *Rockefeller*, 410 U.S. 752, 756, n.5, 93 S.Ct. 1245, 1249, n.5, 36 L.Ed.2d 1; *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2, 92 S.Ct. 995, 998, n.2; 31 L.Ed.2d 274.

Democratic Party of the United States v. *LaFollette*, —— U.S. ——, 101 S.Ct. 1010, 1015 n.13 (1981).

II. THE FEDERAL ELECTION COMMISSION'S INTERPRETATION OF 2 U.S.C. § 441a(d) AS NOT PROHIBITING INTRA-PARTY AGREEMENTS IS NOT CONTRARY TO LAW.

The question presented to the Commission in DSCC's administrative complaint was whether one party committee (a state committee) violated 2 U.S.C. § 441a(d) by designating another party committee (a national committee) for purposes of expenditure limitations contained in § 441a(d)(3). The Commission's interpretation is not contrary to law because the interpretation has a rational basis in the language of the statute itself, in the Commission's regulations and advisory opinions and in the legislative history.

The statutory language, standing alone, does not prohibit the intra-party agreement in question as DSCC argues. Rather, the statute establishes separate expenditure limitations for presidential and congressional elections with respect to national party committees. State party committees are provided expenditure limitations only with regard to House and Senate elections. Thus, "[n]ot withstanding any other provision of law with respect to limitations on expenditures or limitations on contributions," 2 U.S.C. § 441a(d)(1), the statute in question limits to specific amounts the party expenditures, as relevant here, in senatorial elections.[34]

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[34] The Commission's regulations clarify that the limitations of § 441a(d)(3) are separate and distinct for national committees and state committees, 11 C.F.R. § 110.7(b)(1); that neither the national party committees nor state party committees may make independent expenditures in connection with the general election campaigns of their party's federal candidates, 11 C.F.R. § 110.7(a)(5), (b)(4); and

DSCC, however, argues that the language of the statute precludes the intra-party agency agreements at issue. And the court below concluded that because NRSC was not specifically identified in the section [86]

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that the State party central committees will be held responsible for "insuring that the expenditures of the entire party organization are within the limitations." 11 C.F.R. § 110.7(c).

[86] Both the RNC and the DNC have established several political committees which expend funds and/or receive contributions for purposes of influencing federal elections. The Commission's public records disclose that the following committees registered as national Republican Party committees: College Republican National Committee, National Black Republican Council, National Republican Heritage Groups (Nationalities) Council, Republican National Committee—Contributions, Republican National Committee—Expenditures, Republican National Hispanic Assembly, Young Republican National Federation, National Republican Senatorial Committee—Contributions, National Republican Senatorial Committee—Expenditures, National Republican Congressional Committee—Contributions, National Republican Congressional Committee—Expenditures, 1979 Republican Senate—House Dinner, 1980, Republican Senate—House Dinner.

And the following are registered as national Democratic Party committees: Democratic National Committee—Travel Escrow Account, Democrats Abroad—Belgium, Democrats Abroad—France, Democrats Abroad—United Kingdom, DNC Services Corporation/Democratic National Committee, Democratic Senatorial Campaign Committee, Democratic Congressional Campaign Committee, Democratic Congressional Dinner Committee, Democratic House and Senate Council, Association of State Democratic Chairpersons. The court below concluded, however, that "NRSC is neither the 'national' nor a 'State' committee of the Republican Party within the contemplation of Section 441a(d)(3)," apparently relying upon the definitions contained in § 431(14), (15). FEC Pet. App. C at 38-9. This conclusion erroneously assumes that a national political party may have only one political committee and that FECA may prevent the parties from organizing themselves in a manner of their own choosing.

and because the statute does not specifically allow the intra-party agency agreements in question, the statute "seems to preclude" the agreement. FEC Pet. App. C at 39.

All parties to this litigation and the court below necessarily agree, however, that § 441a(d) does not make any reference at all to such intra-party agreements. Indeed the court of appeals could do no more than suggest that had Congress intended to allow such intra-party agreements "it is not unreasonable to think that Congress would have said so explicitly. . . ." FEC Pet. App. C at 41.[36] Thus, the language of § 441a(d) does not prohibit such agreements.

Additionally, by regulation, the Commission has construed § 441a(d)(2) as not prohibiting agency agreements. Thus, the national party committees may make expenditures "through *any* designated agent, including State and subordinate party committees." 11 C.F.R. § 110.7(a)(4) (emphasis added). This regulation, having been promulgated pursuant to the congressional review procedure outlined in § 438(d), presents affirmative evidence that Congress did not intend the language of § 441a(d) to prohibit agency

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[36] This Court has concluded that "absent a clear expression, it becomes necessary to consider the implicit character of the statutory scheme . . . and it is appropriate to defer to the [agency] in determining what resolution of that issue is implied. . . ." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 560. *See also Citizens and Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977) ("[o]ur experience with the inexactitude of congressional language, an inexactitude that perhaps often is inevitable . . . [citing *Buckley* v. *Valeo*, *supra*] does not convince us that much weight can be attached to the use of "any" and "the" respectively . . ."). *Id.* at 45. *See* note 34, *supra*; FEC Pet. App. C at 43 n.34.

agreements between national parties and *any* chosen entity or person in presidential elections.[37] The language of § 441a(d)(2) and § 441a(d)(3) is, of course, similar in all respects relevant herein. Thus, it is not irrational to conclude, as did the Commission, that the language of § 441a(d)(3), like the language of § 441a(d)(2), does not prohibit intra-party agency agreements.

Not only does the statutory language not prohibit intra-party agreements but an interpretation of § 441a(d) which would prohibit such agreements would conflict with the intent of Congress.[38] Apply-

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[37] 11 C.F.R. § 110.7 and the "Explanation and Justification" required by Congress to be submitted pursuant to § 438(d) are attached hereto in the Appendix. The "Explanation and Justification" states that 11 C.F.R. § 110.7 follows the statutory provisions in 2 U.S.C. § 441a(d). Thus, as early as April, 1977, the Commission notified Congress of its interpretation of § 441a(d) as not precluding intra-party agreements. *See* H. Doc. No. 95-44 at 70, 95th Cong., 1st Sess. (1977).

[38] The court below seems to have been concerned that the Commission's interpretation of § 441a(d)(3) would increase the expenditure limitations enacted by Congress. *See* FEC Pet. App. C at 29. However, the court misinterpreted the effect of the Commission's construction of the statute since no more money may be spent under the Commission's interpretation of § 441a(d)(3) than under the court's. Under the appellate court's construction of 2 U.S.C. § 441a(d)(3), a violation of FECA would not occur if a national committee of a political party transfers monies to be spent by a state committee of that political party pursuant to 2 U.S.C. § 441a(d)(3). *See* 2 U.S.C. § 441a(a)(4), Appendix. However, if the state committee requests that the national committee spend those same monies on its behalf, FECA has been violated. This would not appear to be the only reasonable interpretation of the provision at issue. *See* FEC Pet. App. C at 53; *Buckley* v. *Valeo*, 424 U.S. at 57.

ing elementary rules of statutory construction, FECA must be read as a whole in order to ascertain its true meaning, and each section must be construed in conjunction with every other section to produce a harmonious whole. *See National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957); *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 285 (1956); *Johnson* v. *Seaboard Air Line Railroad Co.*, 405 F.2d 645, 654 (4th Cir. 1968), *cert. denied* 394 U.S. 918 (1969). Legislative enactments must be given a sensible and reasonable construction effectuating their purposes. *Schmiedigen* v. *Celebrezze*, 245 F. Supp. 825, 827 (D.D.C. 1965). In discerning legislative intent, courts must project as well as they can how the legislature would have dealt with a concrete situation if it had spoken. *See District of Columbia* v. *Orleans*, 406 F.2d 957, 958 (D.C. Cir. 1968), *quoting City of Chicago* v. *Federal Power Commission*, 385 F.2d 629, 635 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

In 1976, when Congress reconstituted the Commission and amended FECA following this Court's *Buckley* v. *Valeo* decision, Congress clearly endeavored to encourage the close relationship within the political party structure and among various political party committees.[39] Thus, Congress provided that the lim-

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[39] The court below attempted to draw a distinction between what it thought were "political parties, whose role in the political process Congress ought to strengthen," FEC Pet. App. C at 42, and congressional campaign committees. To support this distinction, the court relied upon one Senator's 1974 statement suggesting that national political parties are supported by thousands of people giving $5 and $10 amounts and insinuating that congressional campaign committees are

itations on contributions were not to apply to "transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." 2 U.S.C. § 441a(a)(4). *See also* 2 U.S.C. § 441a(a)(5)(B). Because transfers of funds between the political committees of a party are free from any contribution limitations and are permitted without limit, it is clear that Congress perceived the various committees within the parties to be closely connected units and wished to encourage their working toward a common purpose.

Thus, because NRSC is a party committee,[40] it may freely transfer any or all of its funds to the state committees of the Republican Party if it so desires, and *vice versa*. That is, rather than a state party committee authorizing NRSC to spend those specific amounts, NRSC could transfer the amounts to the state party's account. As Judge Wilkey noted:

> The difference is purely one of form, not substance. It makes absolutely no difference in the scheme of control of campaign expenditures and contributions whether the [NRSC] in Wash-

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supported only by large donors. *Id* . There is no basis in the present record to support this contention. The Commission's public disclosure records indicate that during 1980, 60% of contributions received by RNC were in amounts less than $200 in the aggregate while 82% of NRCC's contributions were in these amounts and 53% of NRSC's contributions were in this category. Moreover, the per curiam court itself, by acknowledging that the congressional campaign committees may not make independent expenditures, FEC Pet. App. C at 39 n.28, recognized that these committees are party committees. *But, cf., Id.* at 44 n.35.

[40] *See* FEC Pet. App. C at 59 n.16. *Cf. Id.* at 44 n.35.

> ington writes a check and mails it to the state committee in Louisville, Kentucky, to be expended for the benefit of the Republican nominee for the Senate in the State of Kentucky, or on the other hand, as is now the practice, the state committee in Louisville, Kentucky, writes a letter to the Senatorial Campaign Committee in Washington authorizing that committee to make expenditures on behalf of the same Republican nominee for the Senate in Kentucky.

FEC Pet. App. C at 53.[41]

Finally legislative history supports the Commission's interpretation of § 441a(d). In 1978, a bill to amend FECA was proposed and, after consideration, reported out of the Committee on House Administration. H.R. 11315, 95th Cong. 1st Sess. (1978), H.R. Rep. No. 95-982, 95th Cong. 2d Sess. (1978). The legislative proposal contained language in § 113 which would have prohibited any "movement of funds" between "the political committees of a national political party (including House and Senate congressional campaign committees of such party) and the political committees of a State political party (including district, local, or subordinate committees of such party) for the purpose of making contributions to, or expenditures on behalf of

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[41] It would appear that the majority opinion was premised upon a policy determination that the court's interpretation would establish a better working relationship between candidates and state parties through § 441a(d) expenditures. *See* FEC Pet. App. C at 44. However, there is absolutely no evidence that Congress intended to affect the candidate-State party relationship via § 441a(d) or § 441a(a)(4). Section 441a(a)(4), however, is strong evidence that Congress was interested in encouraging vital interrelationships between all levels of the political party structure.

any candidate for Federal office." Thus, § 113 of H.R. 11315 was premised upon an interpretation of FECA that party funds could be transferred for the purpose of the transferee committee making contributions or expenditures. The House, however, rejected the rule for consideration of the bill. *See* 124 Cong. Rec. H2261-69 (daily ed. Mar. 21, 1978).[42]

By considering an amendment to FECA which would have the effect of limiting the ability of NRSC to transfer funds to state committees to enable the state committees to make § 441a(d) expenditures, the House recognized that FECA as it now stands does not limit such transfers. By not adopting the proposed amendment, the House left the decision as to the proper mechanism for § 441a(d) expenditures to the political parties themselves.[43] Thus, party committees at the national and state level may work in

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[42] Several members voiced objection to prohibiting transfers between the party committees. For example, Representative Quillen remarked:

> [W]hy reduce the ability of the political parties to support its [sic] candidates? How can the Republican Party unduly influence a Republican candidate? How can the Democratic party unduly influence a Democratic candidate? On what basis should the ability of the two political parties to support their candidates be prevented? And what is improper about a national party committee transferring funds to a State committee for use in Federal campaigns? This bill will prevent that, too.

124 Cong. Rec. H2261 (daily ed. Mar. 21, 1978) (remarks of Rep. Quillen).

[43] Reenactment of a statute without change in its language indicates approval of interpretations rendered prior to the reenactment. *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 351 (1953); *Helvering* v. *Griffiths*, 318 U.S. 371, 395 (1943).

tandem with regard to financing § 441a(d) expenditures if they desire to do so. Clearly, the goal of coordinated party expenditures may be achieved if the state committees designate NRSC to carry out § 441a(d)(3) expenditures just as well as if the national committee were to designate the state committees to carry out § 441a(d)(2) expenditures.

In addition to the rejection of H.R. 11315, the 1980 FECA Amendments[44] contain a number of examples of congressional interest in encouraging state and local party participation in candidate campaigns, rather than focusing upon intra-party relationships. For example in 2 U.S.C. § 431(8)(B)(x), (xi), (xii) Congress exempted certain grass roots activity from the definition of contribution, but provided the exemptions only if the "payments are made from contributions. . . ." Thus, 11 C.F.R. § 100.7(b)(15)(vii) states that "materials purchased with funds donated by the national committee to such State or local committee for the purchase of such materials, shall not qualify under this exemption." Where Congress specifically intended to limit state party committees to the use of funds contributed to them, it so provided. *See* 2 U.S.C. §§ 431(8)(B)(x)(2), 431(8)(B)(xii)(2). Section 441a(d) contains no similar limitation.

In sum, the Commission submits that its interpretation of 2 U.S.C. § 441a(d) is clearly not irrational. The statutory language does not prohibit such intra-party financial arrangements and the Commission's regulations and the legislative history of FECA support the Commission's interpretation. The Commission's decision to dismiss DSCC's complaint, constru-

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[44] *See* note 4, *supra*.

ing § 441a(d)(3) so as not to preclude the intra-party agency agreements challenged therein was consistent with the intent of Congress and requires affirmance by this Court.

CONCLUSION

For reasons set forth herein, this Court should reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APRIL 16, 1981

APPENDIX

2 U.S.C. § 437d. Powers of the Commission

(a) *Specific authorities.* The Commission has the power— . . .

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

2 U.S.C. § 437f. Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with

respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.* Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.* The Commission shall make public any request made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

2 U.S.C. § 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commis-

sion conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days

of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6) (A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately

preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violations of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expediture involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the per-

son involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period begining on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who

knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or

more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into ac-

count, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

2 U.S.C. § 438. Administrative provisions

(a) *Duties of Commission.* The Commission shall— . . .

(8) prescribe rules, regulations, and forms to carry out the provisions of this Act, in accordance with the provisions of subsection (d) of this section . . .

(d) *Rules, regulations, or forms; issuance, procedures applicable, etc.*

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

(3) For purposes of this subsection, the term "legislative day" means, with respect to statements transmitted to the Senate, any calendar day on which the Senate is in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is in session.

(4) For purposes of this subsection, the terms "rule" and "regulation" mean a provision or series of interrelated provisions stating a single, separable rule of law.

(5) (A) A motion to discharge a committee of the Senate from the consideration of a resolution relating to any such rule, regultion, or form or a motion to proceed to the consideration of such a resolution, is highly privileged and shall be decided without debate.

(B) Whenever a commitee of the House of Representatives reports any resolution relating to any such form, rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and

is not debatable. An amendment to the motion is not in order, and is not in order to move to reconsider the vote by which the motion is agreed to or disagreed with.

(e) *Scope of protection for good faith reliance upon rules or regulations.* Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

2 U.S.C. § 441a. Limitations on contributions and expenditures

(a) *Dollar limits on contributions.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that—

(A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts;

(B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and

(C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if—

(i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices;

(ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and

(iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or sug-

gestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be a contribution to such candidate;

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) *Dollar limits on expenditures by candidates for office of President of the United States.*

(1) No candidate for the office of President of the United States who is eligible under section 9003 of title 26 (relating to condition for eligibility for payments) or under section 9033 of title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000 in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for pur-

poses of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) *Increases on limits based on increases in price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year of 1974.

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

(e) *Certification and publication of estimated voting age population.* During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) *Prohibited contributions and expenditures.* No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) *Attribution of multi-state expenditures to candidate's expenditure limitation in each State.* The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each

such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) *Senatorial candidates.* Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

11 C.F.R. § 110.7

§ 110.7 Party committee expenditure limitations (2 U.S.C. 441a(d)).

(a)(1) The national committee of a political party may make expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The expenditures shall not exceed an amount equal to 2 cents multiplied by the voting age population of the United States.

(3) Any expenditure under this paragraph (a) shall be in addition to—

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under §§ 110.1 or 110.2.

(4) The national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees.

(5) The national committee of a political party may not make independent expenditures (see Part 109) in connection with the general election campaign of a candidate for President of the United States.

(b)(1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The expenditures shall not exceed—

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(A) Two cents multiplied by the voting age population of the State; or

(B) Twenty thousand dollars; and

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) Any expenditure under paragraph (b) shall be in addition to any contribution by a committee to the candidate permissible under §§ 110.1 or 110.2.

(4) The party committees identified in (b)(1) shall not make independent expenditures in connection with the general election campaign of candidates for Federal office.

(c) For limitation purposes, State committee includes subordinate State committees. State committees and subordinate State committees combined shall not exceed the limits in paragraph (b)(2) of this section. To ensure compliance with the limitations,

the State committee shall administer the limitation in one of the following ways:

(1) The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission which permits control over expenditures.

EXPLANATION AND JUSTIFICATION OF REGULATIONS

April 13, 1977

11 C.F.R. § 110.7

Party Expenditures

This section follows the statutory provisions in 2 U.S.C. § 441a(d) for the national committee and the State and subordinate State committees of a political party to make coordinated expenditures in the general election on behalf of Presidential, Senate and House candidates. It further provides that the committees may not make independent expenditures on behalf of candidates on whose behalf the statute explicitly permits them to make coordinated expenditures. The section provides sugggested schemes for a State and subordinate State committees to coordinate their expenditures on behalf of candidates. It further provides that subordinate State party committees may make coordinated or uncoordinated expenditures of up to $1,000 on behalf of the party's Presidential ticket. These expenditures are reported to the Presidential candidate's principal campaign committee but do not count against any spending limitations. This provision is derived from 26 U.S.C. § 9012(f).

Explanation and Justification of Regulations Concerning January 8, 1980 Amendments to Federal Election Campaign Act of 1971.

§ 110.7 Party Committee Expenditure Limitations

This section follows current regulation 11 CFR 110.7, except that the provisions regarding limitations and allocations of expenditures by State and local party committees (110.7(b)(5) and 110.7(c)(2)(i)-(iii)) are deleted.

[SEAL] FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 24, 1980

George A. Fisher, Clerk
United States Court of Appeals
for the District of Columbia
United States Courthouse
3rd and Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Democratic Senatorial Campaign Committee v. Federal Election Commission*, No. 80-2074

Dear Mr. Fisher:

During oral argument on September 23, 1980, in the above captioned case, counsel for appellee Federal Election Commission was asked for a citation to legislative history supporting the fact that a national committee of a political party could utilize a national senatorial campaign committee to make expenditures under 2 U.S.C. § 441a(d).

Counsel for the Commission have been unable to discover any language in the legislative history of § 441a(d) *per se* which would indicate that Congress meant to include national senatorial campaign committees as a national committee of a political party under § 441a(d). *See* 2 U.S.C. § 431(14) (definition of "national committee").

However, the Commission submits for the court's information the following excerpts from legislative history of the 1974 and 1976 FECA Amendments which indicate Congress's impression of the role of national senatorial campaign committees within the political party structure:

> Mr. BAKER: I think that the party system in the United States is a blessing in many re-

> spects. and one of its great blessings is that it is so loosely knit that it is not inflexible, but it is strong enough and identifiable enough so that we know, for instance, that the Democratic National Committee, the Democratic Central Campaign Committee and the Democratic Congressional Committees are in fact a part of the Democratic Party.
>
> No one doubts that I think they add strenth [sic] to the party system, and I have a great deal of respect for the two-party system, and believe this amendment will strengthen it rather than diminish it.

119 Cong. Rec. S5194 (daily ed. April 3, 1974) (remarks of Sen. Baker) (discussion of an amendment which would have limited contributions to monies received from individuals).

> The conferees also determined that it is appropriate to set a higher limit on contributions from persons to political committees of national political parties in order to allow the political parties to fulfill thei unique role in the political process. In this connection, the term "political committee established or maintained by a national political party" includes the Senate and House Campaign Committees.

H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58 (1976) (discussion of 2 U.S.C. §§ 441a(a)(1)(B), 441a(a)(2)(B)).

The Commission regrets any inconvenience to the court resulting from this delay.

Sincerely,

/s/ Kathleen Imig Perkins
KATHLEEN IMIG PERKINS
Assistant General Counsel

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001

GEORGE A. FISHER
Clerk

October 1, 1980

Charles N. Steele, Esquire
Office of the General Counsel
Federal Election Commission
1325 K Street, NW
Washington, D.C. 20463

RE: Appeal No. 80-2074, *Democratic Senatorial Campaign Committee* v.
Federal Election Commission

Dear Mr. Steele,

Confirming our telephone conversation this morning, the Court has requested that it be furnished copies of the following Commission decisions:

MUR 780 (January 19, 1979)

MUR 820 (June 19, 1979)

Both decisions were cited in your brief filed in the above referenced case. The Court would like to see the decision or order filed by the FEC in those cases as well as any supporting documents (such as a General Counsel's report) on which the Commission relied. In the event that the Commission merely effected the recommendation of the General Counsel without the issuance of a formal order, please give us a statement to that affect in your cover letter.

Please furnish these requested materials at the earliest possible time.

Very truly yours,

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

GAF:dn
cc: William E. McDaniels, Esquire
James F. Schoener, Esquire

[SEAL] FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 2, 1980

United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
3rd and Constitution Avenue, N.W.
Room 5413
Washington, D.C. 20001

Re: *Democratic Senatorial Campaign Committee* v. *Federal Election Commission*, No. 80-2074

Attention: George A. Fisher, Clerk

Dear Mr. Fisher:

In accordance with the request of the Clerk of the Court, the Commission submits additional materials in connection with the above-captioned case, as follows:

(1) Certification dated January 19, 1979, of final Commission action adopting recommendations as set forth in the General Counsel's Report dated December 18, 1978.

(2) Final General Counsel's Report dated December 18, 1978, with regard to MUR 780 with attachments.

(3) Certification dated June 15, 1979, of final Commission action with regard to MUR 820, approving a recommendation as set forth in the General Counsel's Report dated June 13, 1979.

(4) Final General Counsel's Report dated June 13, 1979, with regard to MUR 820 with attachments.

Where the Commission adopts the recommendation of the Office of General Counsel as stated in the General Counsel's Report, the Report serves as a statement of reasons for the Commission's action.

Sincerely,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

cc: Robert F. Bauer
William E. McDaniels
James F. Schoener

[Enclosures have been
deleted for purposes of this brief]

[SEAL] FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 7, 1980

Ms. Christine Kohl
Chief Staff Counsel
United States Court of Appeals
for the District of Columbia Circuit
3rd and Constitution Avenue, N.W.
Room 6321
Washington, D.C. 20001

Re: *Democratic Senatorial Campaign Committee* v. *Federal Eelection Commission*, No. 80-2074

Dear Ms. Kohl:

As per your telephone conversation of October 6, 1980, with Ms. Kathleen Imig Perkins of my staff, I am submitting the following Commission documents in response to the court's inquiry as to whether the DSCC has acted as an agent on the national level for the purpose of making § 441a(d) expenditures:

(A) FEC Disclosure Series No. 4: National Party Political Committee Receipts and Expenditures, Democratic and Republican—1976 Campaign at 31-40. This document demonstrates that the Democratic National Committee, the DNC Services Corporation, the Democratic Congressional Campaign Committee, and the Democratic Senatorial Campaign Committee made § 441a (d) expenditures in 1976. The Republican § 441 (d) expenditures are set forth at 36-40 for 1976.

(B) FEC Reports on Financial Activity 1977-1978, Final Report—Party and Non-Party Po-

litical Committees at 124-127. The chart at the bottom of page 125 shows the total § 441a(d) expenditures for the Democratic Party for all federal candidates during the 1978 election cycle, *i.e.*, $68,822 expended by the Democratic National Committee and no funds expended by the Democratic Congressional or Senatorial Committees. A similar chart for Republican expenditures appears at the bottom of page 127.

A computer check of the Commission's disclosure reports through June, 1980, disclosed that the Democratic National Committee had authorized the Democratic Congressional Campaign Committee to make one § 441a(d) expenditure in the amount of $4,500. *See* attached letter. Although the Federal Election Campaign Act does not require that agency agreements be filed with the Commission, the Democratic National Committee filed the attached authorization letter with one of its regularly-scheduled disclosure reports to clarify the § 441a(d) expenditure made by the Democratic Congressional Campaign Committee.

Since the propriety of agency agreements at the national level was not an issue in the district court, the record below does not contain references to these public documents on file at the Commission.

Sincerely,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

Enclosure
[Enclosures have been deleted
for purposes of this brief]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 344675 310 (2 OF 2)